A

MOHD RAFIZI RAMLI

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
MOHAMED APANDI ALI JCA
LINTON ALBERT JCA
MOHTARUDIN BAKI JCA
[CRIMINAL APPLICATION NO: B-09-366-11-2012]
C 28 NOVEMBER 2013

CRIMINAL PROCEDURE: *Courts - High Court - Inherent powers - Exercise of discretionary powers to stay and/or set aside charge against accused - Application for - Whether there was element of mala fide in* D *instituting charge - Whether exercise of inherent powers of court justified*

The appellant was charged in the Sessions Court for committing an offence under s. 97(1) of the Banking and Financial Institutions Act 1989. The appellant made an application to the High Court E in order for the court to exercise the discretionary powers under its inherent jurisdiction and under s. 5 of the Criminal Procedure Code. The reliefs sought, *inter alia*, were (i) that the charge against the appellant be stayed and/or set aside and quashed; and (ii) that the appellant be discharged and acquitted. However, the High F Court refused the said application and hence, this appeal. It was the appellant's contention that the charge and prosecution against him was *mala fide*, against public policy, politically motivated and/ or an abuse of process.

Held (dismissing appeal)

G **Per Mohamed Apandi Ali JCA delivering the judgment of the court:**

(1) The issue of *mala fide* was a question of fact and must be proved by evidence. The appellant would have all the H opportunity to adduce such evidence, if any, at the trial proper. On the facts, there was no evidence of any *mala fide* on the part of the prosecution in instituting the charges against the appellant. The burden to prove such serious allegations was upon the appellant and mere suspicion was not I enough. Further, there was no plausible reason for the High Court to interfere with the prosecution's duty in the criminal proceedings against the appellant. Inherent power could not

be invoked when there was another remedy available, namely the right to be heard at the trial proper. In the circumstances, there was no miscarriage of justice to justify any exercise of the inherent jurisdiction of the High Court. (paras 8, 12 & 17)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dituduh di Mahkamah Sesyen kerana melakukan kesalahan di bawah s. 97(1) Akta Bank dan Institusi-Institusi Kewangan 1989. Perayu telah membuat satu permohonan ke Mahkamah Tinggi supaya mahkamah melaksanakan budi bicaranya di bawah kuasa sedia ada dan di bawah s. 5 Kanun Tatacara Jenayah. Antara relif-relif yang dipohon adalah agar (i) tuduhan terhadap perayu digantung dan/atau diketepikan dan dibatalkan; dan (ii) perayu dilepaskan dan dibebaskan. Walau bagaimanapun, Mahkamah Tinggi menolak permohonan tersebut dan oleh itu, rayuan ini. Perayu menghujahkan bahawa tuduhan dan pendakwaan terhadapnya adalah *mala fide*, bertentangan dengan kepentingan awam, mempunyai dorongan politik dan/atau suatu penyalahgunaan proses.

Diputuskan (menolak rayuan)
Oleh Mohamed Apandi Ali HMR menyampaikan penghakiman mahkamah:

(1) Isu berkenaan *mala fide* adalah satu persoalan fakta dan mesti dibuktikan melalui keterangan. Perayu mempunyai segala peluang untuk mengemukakan keterangan sebegitu, jika ada, semasa perbicaraan. Berdasarkan fakta, tiada keterangan berkenaan *mala fide* pada pihak pendakwaan dalam memulakan tuduhan terhadap perayu. Beban untuk membuktikan tuduhan serius sebegitu terletak atas perayu dan keraguan semata-mata tidak mencukupi. Selanjutnya, tiada alasan munasabah untuk Mahkamah Tinggi campur tangan dengan tugas pendakwaan dalam prosiding jenayah terhadap perayu. Kuasa sedia ada tidak boleh dibangkitkan apabila terdapat remedi lain, iaitu hak untuk didengar semasa perbicaraan. Dalam keadaan ini, tiada ketidakadilan untuk menjustifikasikan sebarang pelaksanaan bidang kuasa sedia ada Mahkamah Tinggi.

Case(s) referred to:
Connelly v. Director of Public Prosecutions [1964] 2 All ER 401 ***(refd)***
Director of Public Prosecutions v. Humphrys [1976] 2 All ER 497 ***(refd)***
Karpal Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 ***(refd)***
Long Samat & Ors v. PP [1974] 1 LNS 80 FC ***(foll)***
Mills v. Cooper [1967] 2 All ER 100 ***(refd)***
R v. Chairman, County of London Quarter Sessions ex parte Downes [1954] 1 QB 1 ***(refd)***
R v. Great Yarmouth Magistrates', ex p Thomas, Daris and Darlington [1992] Crim LR 116 ***(refd)***
R v. Stubley, R v. Wardle [1999] QB 822 ***(refd)***
Regina v. Governor of Brixton Prison ex Parte Soblen [1963] 2 QB 243 ***(refd)***
Tan Boon Hock v. PP [1978] 1 LNS 194 FC ***(refd)***
Yeap Seok Pen v. Government of the State of Kelantan [1986] 1 LNS 89 PC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 5, 376
Federal Constitution, art. 145(3)

For the appellant - R Sivarasa; M/s Daim & Gamany
For the respondent - Nahra Dollah (Normie Baizura Amiruddin with her); DPPs

[Appeal from High Court, Shah Alam; Criminal Application No: 44-59-09-2012]

Reported by Kumitha Abd Majid

JUDGMENT

Mohamed Apandi Ali JCA:

Introduction

[1] This is an appeal against the decision of the High Court in refusing an application by the appellant by way of motion in a Criminal Application for the court to exercise the discretionary powers under its inherent jurisdiction and under s. 5 of the Criminal Procedure Code ("CPC"). The reliefs sought by the appellant at the High Court reads as follows:

> 1. That this Honourable Court makes an order that the criminal charge and prosecution against the Applicant under section 97(1) of the Banking and Financial Institutions Act 1989 and punishable under section 103(1)(a) of the same Act that is read together with Serial Number 126 of the Fourth Schedule of the same Act at the Shah Alam Sessions Court, Criminal Case No: 62D-(213 & 214)-07/2012 is stayed and/or set aside and quashed;

2. Further that the Honourable Court orders that the Applicant be discharged and acquitted;

3. That the proceeding of Criminal Case No: 62-D(213 & 214)-07/2012 at the Shah Alam Sessions Court is stayed until the hearing of this motion is completed;

4. Any other orders and/or reliefs deemed fit and proper by the Honourable Court.

[2] The above application was heard by way of affidavit evidence; and the grounds forwarded by the appellant in support of his application, are briefly as follows:

(a) The criminal proceeding is an abuse of process and travesty of justice. It is the courts' duty to ensure there should be a fair trial according to law and further to protect and promote the dignity and integrity of the criminal justice process and judicial system.

(b) The said charge against the applicant is against public policy because the applicant is a whistleblower who had a good faith exercised his duty to the public to disclose serious acts of corruption and abuse of power involving public funds.

(c) The said charge against the applicant is politically motivated, an act of selective prosecution, done in bad faith, undermines the rule of law, and therefore ought not to be accepted by the courts.

[3] After reading the appeal records, including the written submissions filed by both parties and upon hearing oral submissions from the appellant's counsel, we dismissed the appeal. We now give our reasons for doing so.

Brief Facts Of The Case

[4] The brief facts of the case, as submitted by learned counsel for the appellant and not disputed by the respondent are as follows:

On 1.8.2012, the Applicant was arrested and charged at the Shah Alam Sessions Court together with one Johari bin Mohamad under Section 97(1) of Banking and Financial Institutions Act 1989 ("BAFIA") and punishable under Section 103(1)(a) of the same Act and read together with Serial Number 126 of the Fourth

Schedule for having access to and revealing the said documents on 7.3.2012 to reporters of the following Public Bank Berhad banking documents:

(a) Customer Profile - Balance Summary of National Feedlot Corporation Sdn Bhd;

(b) Customer Profile - Balance Summary of National Meat and Livestock Sdn Bhd;

(c) Customer Profile - Balance Summary of Agroscience Industries Sdn Bhd;

(d) Customer Profile - Balance Summary of Mohamad Salleh bin Ismail.

The directors and/or major shareholders of the National Feedlot Corporation Sdn Bhd ("NFC"), Agroscience Industries Sdn Bhd and National Meat and Livestrocks Corporation Sdn Bhd comprise of Datuk Seri Mohamad Salleh bin Ismail, the husband of Datuk Seri Shahrizat Abdul Jalil, then Women, Family and Community Development Minister and their two sons and daughter.

On 24.10.2011, the 2010 Auditor's General Report was released to the public and the media highlighted the issues raised including on the National Feedlot Centre and NFC. NFC was provided with a loan of RM250 million from the government to *inter alia* establish and operate a National Feedlot Centre to be consistent with the government's policy of developing, promoting and nurturing the production of beef and beef products through the National Feedlot Centre as a centre for commercial and integrated cattle feedlot.

Starting on 25.10.2011, the Applicant and other leaders of Parti Keadilan Rakyat held more than twenty press conferences and/or released press statements on the National Feedlot Centre/NFC scandal, among others dealing:

(a) The failure of the National Feedlot Centre project to meet its target of 40% of domestic demand for beef;

(b) The unlawful transfer of NFC funds to companies that were controlled/owned by Datuk Seri Shahrizat Abdul Jalil's family including National Meat and Livestock Corporation, Real Food Company, Meatworks Restaurant and Brawn Steakhouse;

(c) NFC officials were spending lavishly overseas;

(d) The purchase of 2 condominiums at One Menerung, Bangsar;

(e) The purchase of 2 plots of land in Precinct 10, Putrajaya;

(f) The purchase of a Mercedes CLS 350 CGI;

(g) The purchase of a condominium at Orchard Scotts, Singapore;

(h) The purchase of 2 condominiums at Marina Bay Suites, Singapore.

On 12.3.2012, following the Applicant's expose and the complaint by Kumpulan Jingga 13 to the MACC on 10.11.2011, Datuk Seri Mohamad Salleh was charged in the Sessions Court for criminal breach of trust of federal funds given to NFC under Section 409 of the Penal Code for unlawfully transferring RM40 million to another company where he and his children are the directors and/or major shareholders. In addition he was also charged under Section 132 of the Companies Act 1965 for misusing the company assets without company authorisation.

Contention By The Appellant

[5] The crux of the contentions of the appellant is that "the charge and prosecution against the appellant/applicant is *mala fide*, against public policy, politically motivated selective prosecution and/or an abuse of process".

[6] It is common ground that no special provision has been made under the CPC or any other laws in Malaysia that provide for the setting aside or quashing of a criminal charge on the basis of the above complaints by the appellant. It is therefore acceptable that the said application by the appellant at the High Court was correctly premised on the provisions of s. 5 of the CPC and the inherent jurisdiction of the High Court. However, in such exercise of its inherent power the court must be slow in doing so and ensure that such exercise do not conflict with any statutory provisions (see Federal Court decision in *Tan Boon Hock v. PP* [1978] 1 LNS 194; [1979] 1 MLJ 236).

[7] Learned counsel for the appellant in forwarding his submissions relied on the following case law:

(a) *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183; [1991] 2 MLJ 544;

(b) *Director of Public Prosecutions v. Humphrys* [1976] 2 All ER 497;

(c) *Mills v. Cooper* [1967] 2 All ER 100;

(d) *Connelly v. Director of Public Prosecutions* [1964] 2 All ER 401;

(e) *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301.

Our Analysis

[8] It is our judgment that upon perusal of all the affidavit evidence filed therein in this case, we could not find any evidence to sustain the allegations of *mala fide* or against public policy. It must be noted that the burden to prove such serious allegations is upon the appellant and it is indeed a heavy one and mere suspicion is not enough. (See the Privy Council's analysis of *Regina v. Governor of Brixton Prison ex Parte Soblen* [1963] 2 QB 243 in *Yeap Seok Pen v. Government of the State of Kelantan* [1986] 1 LNS 89; [1986] 1 MLJ 449 at pp. 452 - 453).

[9] When there is a challenge to the right and discretion to prosecute, it is inevitable that such challenge must be cross-referred with the powers and discretions of the Public Prosecutor. In this country the Public Prosecutor ("PP") is the Attorney General ("AG"). His powers in that capacity is as enshrined in art. 145(3) of the Federal Constitution, which reads as follows:

> (3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial.

[10] The position of AG as the PP is clearly spelt out in s. 376 of the CPC, which reads as follows:

> 376. Public Prosecutor
>
> (1) The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.
>
> (2) The Solicitor-General shall have all powers of a Deputy Public Prosecutor and shall act as Public Prosecutor in case of the absence or inability to act of the Attorney General.
>
> (3) The Public Prosecutor may appoint fit and proper persons to be Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the rights and powers vested in

or exercisable by the Public Prosecutor by or under this Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally and he may designate any of such Deputy Public Prosecutors as Senior Deputy Public Prosecutors.

(3A) The Public Prosecutor may appoint fit and proper persons to be Assistant Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and, subject to such limitations or restrictions as may be specified by the Public Prosecutor, shall have all the powers of a Deputy Public Prosecutor.

[11] From the above statutory provisions, we are in agreement with what was said by Suffian LP in his comments on art. 145(3) in *Long Samat & Ors v. PP* [1974] 1 LNS 80; [1974] 2 MLJ 152, which reads as follows:

> In our view, this clause from the supreme law clearly gives the Attorney-General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue. (For the position in England, please see Viscount Dilhorne's speech at pages 32-3 in *Smedleys Ltd v. Breed*). Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.
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> Anyone who is dissatisfied with Attorney-general's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts.

[12] On the issue of *mala fide*, it is our judgment that such an issue, if there is one, is a question of fact and must be proved by evidence and this can only be adduced and tested at the trial. In the circumstances of the case, the appellant will have all the opportunity to adduce such evidence if any, at the trial proper. On this point, it is suffice to quote what was held in *R v. Great Yarmouth Magistrates', ex p Thomas, Davis and Darlington* [1992] Crim LR 116, that was cited with approval in *R v. Stubley, R v. Wardle* [1999] QB 822, which reads follows:

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> Had there been *mala fides*, the court would have to think of the consequences of that. Here the magistrates' court was confronted with allegation of *mala fides* because the defence alleged that they had been victims of a rather unpleasant trick which deprived them of their liberty. The basis for that is not in fact a matter for this court. It is a matter which can be determined only in the magistrates' court upon whatever evidence is put before … the burden of establishing dishonesty lays fairly and squarely on the defence, and it was a heavy burden.

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[13] On this issue too, we find that we need not depart from the rationale of the very case law authorities cited by learned counsel for the appellant. In *Director of Public Prosecutions v. Humphrys* [1976] 2 All ER 497, Viscount Dilhorne (at p. 509) wrote as follows:

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> Where an indictment has been properly preferred in accordance with the provisions of that Act, has a judge power to quash it and to decline to allow the trial to proceed merely because he thinks that a prosecution of the accused for that offence should not have been instituted? I think there is no such general power and that to recognize the existence of such a degree of omnipotence is, as my noble and learned fried, Lord Edmund-Davies, has said, unacceptable in any country acknowledging the rule of law.

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[14] In *R v. Chairman, County of London Quarter Sessions ex parte Downes* [1954] 1 QB 1, Lord Goddard CJ succinctly stated the law as follows:

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> Once an indictment is before the court the accused must be arraigned and tried thereon unless (a) on motion to quash or demurrer pleaded it is held defective in substance or form and not amended; (b) matter in bar is pleaded and the plea is tried or confirmed in favour of the accused; (c) a *nolle prosequi* is entered by the Attorney-General, which cannot be done before the indictment is found; or (d) if the indictment disclosed an offence which a particular court has no jurisdiction to try …

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[15] In *Connelly v. Director of Public Prosecutions* [1964] 2 All ER 401; [1964] 2 AC 1254, the House of Lords through Lord Morris of Borth-y-Gest, at pp. 1299-1300, held that:

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> The learned judge declined to give any direction to the prosecution that they should not proceed. They did proceed, and in due course the appellant was convicted. My Lords, in my view the learned judge was entirely correct in so declining. He had no power to suppress the prosecution. There was no abuse of the process of the court. The indictment was correct in form. There

was no basis for the quashing of it. Should it, then, be said (in a somewhat vague and imprecise way) to have been "unfair" that the appellant should have been tried on the second indictment? The guiding principles as to what is fair and in the interests of justice have been evolved over the centuries: some of them, indeed, find their expression in the rules governing the pleas of *autrefois acquit* and *autrefois* convict and other kindred pleas; but if an appellant, being faced with a charge, cannot show that any of these pleas avail him, why is it unfair that he should take his trial? He will not be convicted unless his guilt of the charge is established so that a jury are quite sure of it. Why is that contrary to the interests of justice? The most that can be said in this case is that if there had not been a rule of practice which prevented the joinder in one indictment of other charges together with a charge of murder and if there had been such a joinder and all offences had been charged in one indictment and tried together, and if in that event there had been misdirection in the summing-up similar to the misdirection in the summing-up on the trial of the first indictment and if the appellant had been convicted by a jury, the result of an appeal to the Court of Criminal Appeal would have been that the appellant would have been acquitted of all charges. That the plight of the appellant would on all those suppositions have been different does not seem to me to be a valid basis for a view that it was contrary to the interests of justice that the trial of the second indictment should proceed. In any event, if there had been a joinder of all charges in one indictment it is possible that there might have been a request to have a separate trial of the robbery count. I consider that if a charge is preferred which is contained in a perfectly valid indictment which is drawn so as to accord with what the court has stated to be correct practice and which is presented to a court clothed with jurisdiction to deal with it and if there is no plea in bar which can be upheld the court cannot direct that the prosecution must not proceed.

[16] In fact in *Humphry*'s case, Viscount Dilhorne did caution about the danger of the perception that a judge is being involved in the act of prosecution. At p. 511 of the cited case, he wrote as follows:

A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.

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Conclusion

[17] For the reasons as explained above, we find that there is no evidence that there was any *mala fide* on the part of the prosecution in instituting the charges against the appellant. It is also our finding that there is no plausible reason for the High Court to interfere with the prosecution's duty in the said criminal proceedings against the appellant. To our mind, the appellant is not precluded from raising what he is alleging in his application, in his defence at the hearing of the criminal trial against him. From that point of view, we also find that there is no miscarriage of justice to justify any exercise of the inherent jurisdiction of the High Court. Inherent power cannot be invoked when there is another remedy available, namely the right to be heard at the trial proper.

[18] In short, we unanimously find that there is no merit in the appeal. The appeal is dismissed and we accordingly order the trial to proceed expeditiously.